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In the Supreme Court of the United States

OCTOBER TERM, 1976

THE ADHESIVES AND SEALANT COUNCIL, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In May 1972, the Commission initiated an investigation into the adequacy of protective services[1] provided by all modes of surface transport. Motor common carriers of general commodities—which primarily transport less than-truckload (LTL) shipments of diverse goods—were a special focus of the investigation, because some shippers of products that require protective services only during very

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[1]"Protective service" involves the use of specially designed equipment, such as insulated, heated, or refrigerated trailers, to maintain temperature control during transport. Some commodities, such as dairy products and frozen foods, need protection throughout the year, while others, such as bottled liquids, chocolate, and water-based paints, require protection only during periods of extremely hot or cold weather.

hot or cold weather had complained to the Commission that such carriers sometimes refused to handle their products during periods of extreme temperatures (Pet. App. A-2).

After considering statements submitted by shippers and carriers as well as evidence developed by its Bureau of Enforcement, the Commission determined that all types of surface common carriers—including motor common carriers of general commodities—were providing protective services in a "reasonably adequate" manner (Pet. App. A-36). Accordingly, the Commission discontinued the investigation without issuing any new rules regarding protective services (Pet. App. A-5 to A-39). The Commission's report noted the continuing validity of the principle, first articulated in *Mid-Western Motor Frt. Traffic Bureau, Inc.* v. *Eichholz*, 4 M.C.C. 755, that general commodities carriers may properly publish tariffs which require shippers to determine that protective service equipment is available before they tender perishable shipments.

Petitioners, who are shippers of commodities requiring protection only from extreme heat or cold, petitioned for judicial review. The court of appeals affirmed (Pet. App. A-1 to A-4).

Because petitioners challenged neither the Commission's finding that general commodities carriers were providing protective services in a reasonably adequate manner nor its reaffirmation of the *Eichholz* rule, the court "found it difficult to know exactly what relief they were seeking" (Pet. App. A-3). Under questioning by the court at oral argument, counsel for petitioners explained that petitioners were concerned that certain language in the order might in the future be used by the Commission as a basis for summarily rejecting all complaints alleging failure to provide protective services that might be filed by shippers against particular general commodities carriers (*ibid.*).

In its opinion, the court held that the language of the order did not justify petitioners' fear that shipper complaints would henceforth be summarily rejected (Pet. App. A-4):

> The court does not read the Commission's opinion as meaning that under no circumstances would it entertain for investigation and appropriate action a complaint that a particular common carrier is unreasonably and arbitrarily failing to supply the service required of it by the statute and the terms of its certificated authority. * * * The finding by the Commission in its general investigation that the service presently being provided is "reasonably adequate" does not appear to us to foreclose inquiry by the Commission in appropriate circumstances into the alleged deficiencies of a particular carrier.

The court further held that, inasmuch as petitioners do not question the overall adequacy of the protective services provided by the general commodities carriers, their proper recourse is to file specific complaints with the Commission against any carrier they believe to be unreasonably failing to provide such services.

The decision of the court of appeals is correct and further review is not warranted.

1. Petitioners' main argument is that the Commission wrongly relieved carriers of their statutory duty to serve customers (Pet. 8). This contention reflects a misunderstanding of the Commission's report. The Commission, in a finding unchallenged by petitioners here or in the court of appeals (Pet. App. A-2), determined that the general level of protective services by motor common carriers "is reasonably adequate" (Pet. App. A-36). Because of that record of adequacy, the Commission declined to adopt any general rule requiring all carriers

to possess a certain amount of special equipment, and it discontinued the investigation (Pet. App. A-33, A-36). This does not mean, however, that the Commission granted the carriers a blanket dispensation from providing protective services or that it compromised the carriers' duty, imposed in every carrier's certificate, to perform the service authorized on a "reasonably continuous and adequate basis."[2] Thus, as the court of appeals recognized (Pet. App. A-4), it might well be unreasonable for a particular carrier in some circumstances not to provide protective services, although there is no general requirement that carriers buy and maintain protective equipment. For example, a carrier might have to furnish protective services where there is a high volume of potential traffic requiring them. Shippers remain free to present such complaints to the Commission, and the Commission in proper circumstances will take action to insure that shippers are satisfied. Moreover, the Commission report makes clear that, if at some future date it finds that the general level of protective services no longer is adequate, it has the authority and the will to take effective industry-wide action to improve that service (Pet. App. A-28).

Since the Commission did not rule that carriers are free to dispense with protective services, petitioners' contention that the court of appeals erred in not reviewing the issue (Pet. 11) is unsound.[3] Petitioners will be able

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[2]The Commission writes this language into certificates under the authority of Section 204a(1) of the Interstate Commerce Act, 49 U.S.C. 304a(1).

[3]Petitioners quote *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, and *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (Pet. 12), in arguing that a justiciable issue is presented. However, those cases are inapposite because they involve the right of

to obtain judicial review should they ever file a complaint concerning the lack of protective services that is rejected by the Commission. Until then, however, petitioners' concern remains merely speculative and presents no issue ripe for judicial determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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affected parties to challenge agency orders promulgating new regulations. In the instant case, the Commission issued no new rules regarding protective services and simply discontinued its investigation after determining that protective services were "reasonably adequate" a finding that petitioners do not challenge.